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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 1088 109

CHARLES LALOR BURDICK and CHEMICAL BANK & TRUST COMPANY, Trustees of the Last Will and Testament of Willard A. Lalor, deceased,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to Review a Decision of the United States Circuit Court of Appeals, Second Circuit, and Supporting Brief

TOWNSEND & LEWIS,
Attorneys for Petitioners,
Office and P. O. Address,
120 Broadway,
New York, N. Y.

DALLAS S. TOWNSEND,
GARDNER D. HOWIE,
RALPH M. JERSKEY,
Of Counsel.

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Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition of Charles Lalor Burdick and Chemical Bank & Trust Company, Trustees of the Last Will and Testament of Willard A. Lalor, Deceased, for Writ of Certiorari to review a decision of the United States Circuit Court of Appeals, Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Charles Lalor Burdick and Chemical Bank & Trust Company, Trustees of the Will of Willard A. Lalor, deceased, respectfully show to the Court as follows:

Opinions Below

The opinion of the United States Board of Tax Appeals is reported at 40 B. T. A. 1040 and is produced in full in

the Record at pages 24-32. The United States Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals in an opinion reported at 117 Fed. (2d) 972. The decision of the Circuit Court of Appeals was handed down on February 27, 1941.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347).

Question Presented

The question is whether two legacies stated in a Will as given and bequeathed to the Trustees of such educational institutions as testator's sister and nephew respectively might select, with the proviso that if they should fail to designate within a year after probate the particular institution or institutions within such restricted class, the legacies should lapse and form part of the residue, the beneficiaries of which were private, are deductible from the gross estate, among other surrounding circumstances where a corporate Foundation concededly charitable and educational within the meaning of Section 303(a)(3) of the Revenue Act of 1926, as amended, was so designated within less than a year after probate, and where payment of the legacies was made by the Executors to the Trustees of such corporate Foundation.

Statute and Regulations Involved

The Revenue Act of 1926 (44 Stat. 9, ch. 27), as amended, provides in part as follows:

"Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—

* * * * * * *

(3) The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, * * * but only if such contributions or gifts are to be used by such trustee or trustees * * * exclusively for religious, charitable, scientific, literary, or educational purposes * * *."

Regulations 80 (1937 Edition) provides in part as follows:

"Art. 44. *Transfers for public, charitable, religious, etc., uses.*—Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate if in either case the property was transferred * * * (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * * if no part of the net earnings of the corporation or association inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; or (3) to a trustee or trustees, * * * if such transfers, legacies, bequests, or devises are to be used by such trustee,

trustees, * * * exclusively for religious, charitable, scientific, literary, or educational purposes * * *."

"Art. 47. *Conditional bequests.*—If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

Statement of Case

The relevant facts, as stipulated by the parties (R. 69-92) and as found by the Board of Tax Appeals (R. 25-29), may be summarized as follows:

Charles Lalor Burdick and Chemical Bank & Trust Company, the petitioners, are the Trustees of the Will of Willard A. Lalor, who died a resident of the District of Columbia on October 9, 1934. He had inherited a substantial part of his fortune from a brother, John Charles Lalor, a distinguished chemist, as a memorial to whom he was interested in organizing or endowing an enterprise for chemical research. He discussed plans for its establishment with his sister, Anna Lalor Burdick, and with her son, Charles Lalor Burdick, also a distinguished chemist.

To effect his desires, he executed a Will in which a legacy of $100,000 was bequeathed "to the Trustees of

such educational institution" as his sister might select, and a legacy of $300,000 to "the Trustees of such educational institution" as his nephew might select.

The Will provided among other things for written designation by his sister and his nephew respectively, of the particular institution or institutions within such restricted educational class to the Trustees of which the legacies bequeathed should be paid, but added a proviso as to each that in the event such designation should not be received within one year after probate of the Will, the legacy should lapse and form part of the residue. The beneficiaries of the residuary clause were individuals.

After executing the Will the testator had numerous discussions with his sister and his nephew as to the legacies, and both prior and subsequent to his death the sister and the nephew discussed the matter with heads of leading universities and other prominent educators, with a view to determining the most practicable manner of effectuating the testator's wishes and intentions with respect to the bequests. At the time of his death on October 9, 1934, however, no definite choice had been reached, nor any designation made, either by the sister or the nephew, of a particular institution or institutions.

On August 27, 1935, The Lalor Foundation, Inc., was incorporated in Delaware, under the management of Trustees, as recipient of the legacies.

On October 14, 1935, less than a year after probate of the Will, the sister and the nephew gave the Executors written notice of their designation of said The Lalor Foundation, Inc., as the particular "educational institution", among the class which the Will made the object of such legacies, to the Trustees of which the legacies should be paid.

The Federal Estate Tax was not the subject of a 90-day letter until November 4, 1937, over two years later.

Such payment, aggregating $400,000, was paid accordingly by the Executors to the Trustees of The Lalor Foundation, Inc., and on or about March 4, 1936, the Executors' final account showing such payment was filed and on April 10, 1936 was duly approved and passed.

The Lalor Foundation, Inc., concededly was organized and is operated exclusively for scientific and educational purposes, no part of its net earnings inures to the benefit of any private stockholder or individual, and it carries on no propaganda and does not attempt to influence legislation.

In their Federal Estate Tax Return, which on October 8, 1935, had been filed in the Office of the Collector of Internal Revenue for the Second New York District, the Executors had deducted from the amount of the gross estate such sum of $400,000 paid to The Lalor Foundation, Inc., as a charitable bequest or legacy by the testator.

Such fund is hereinafter described as the "legacy".

On November 4, 1937, the Commissioner of Internal Revenue mailed a deficiency notice among other things disallowing such $400,000 deduction. On or about January 26, 1938, and within the ninety-day period prescribed by statute, the Executors filed a petition with the United States Board of Tax Appeals to review the Commissioner's determination. In accordance with the opinion of the Board promulgated on December 7, 1939, a decision and order was made and entered on January 8, 1940, sustaining his disallowance of the deduction and fixing an Estate Tax deficiency of $148,594.52.

Such amount of deficiency tax resulted almost entirely from the disallowance of the deduction from the value of

the gross estate of the $400,000 legacy paid by the Executors to The Lalor Foundation, Inc., as aforesaid. Included in this amount, however, were certain additional items, but the only item which was the subject of review by the Circuit Court of Appeals upon the petitioners' appeal to that Court was the said $400,000 paid to The Lalor Foundation, Inc.

The errors assigned and relied upon on the petitioners' appeal from the Board of Tax Appeals to the Circuit Court of Appeals are set forth in detail at pages 49 to 54 of the Record.

Before the Circuit Court of Appeals it was the petitioners' contention, among others, that the provision in the Will that the legacy should lapse if a particular charity should not be designated within the prescribed period should not defeat the right to the deduction claimed, since payment of the legacy was made to an acknowledged charity, designation of which was made within the period limited by the Will and within the period limited by reasonable implication in the first paragraph of Article 47 of Regulations 80.

Not only, however, did the Circuit Court's opinion erroneously fail to sustain or consider such contention, but the Circuit Court based its decision substantially upon an erroneous application and construction of Article 47's second paragraph, which the Court stated to be the law controlling the situation.

Specifications of Error

(1) The Circuit Court of Appeals erred in holding and deciding that the sum of $400,000 paid by the Executors of the testator's Will to The Lalor Foundation, Inc., was

not deductible from the value of the testator's gross estate as a legacy bequeathed by the testator in Article "THIRD" of his Will to a charitable, scientific or educational corporation within the purview of Section 303(a)(3) of the Revenue Act of 1926, as amended.

(2) The Circuit Court of Appeals erred in failing to hold and decide that the sum of $400,000 paid by the Executors of the testator's Will to The Lalor Foundation, Inc., was deductible from the value of the testator's gross estate as a legacy bequeathed by the testator in Article "THIRD" of his Will to a charitable, scientific or educational corporation within the purview of Section 303(a)(3) of the Revenue Act of 1926, as amended.

(3) The Circuit Court of Appeals erred in holding and deciding that the second paragraph of Article 47 of Regulations 80 is applicable to, and in construing said paragraph as controlling adversely to the petitioners upon, the charitable legacy of $400,000 made in Article "THIRD" of the testator's Will.

(4) The Circuit Court of Appeals erred in failing to hold and decide that the first paragraph of Article 47 of Regulations 80 is applicable to, and controlling in petitioners' favor upon, the charitable legacy of $400,000 made in Article "THIRD" of the testator's Will.

(5) The Circuit Court of Appeals erred in failing to hold and decide that the charitable legacy of $400,000 made in Article "THIRD" of the testator's Will was a legacy, the transfer of which, within the purview of the first paragraph of Article 47 of Regulations 80, was "dependent upon the performance of some act or the happening of some event in order to become effective", to wit, the

designation by the testator's sister and nephew respectively, in the period and manner set forth in Article "THIRD" of the testator's Will, of the particular educational institution within such class to the Trustees of which the testator gave and bequeathed such legacy; and that such designation having taken place, the deduction from the value of the testator's gross estate of said $400,000 paid by his Executors to The Lalor Foundation, Inc., should have been allowed under said first paragraph of Article 47.

(6) The Circuit Court of Appeals erred in failing to hold and decide that the period of time limited in Article "THIRD" of the testator's Will for the making of the aforesaid designation more fully described in Assignment "(5)" hereof was a reasonable period within the meaning of and in compliance with the first paragraph of Article 47 of Regulations 80.

(7) The Circuit Court of Appeals erred in holding and deciding in effect that the right to a deduction from the value of the testator's gross estate of the amount of the legacy provided for in Article "THIRD" of his Will was defeated *ipso facto* by the provision that, in the event designation of the particular educational institution to the Trustees of which such legacy was to be paid should not be made within the time and within the manner prescribed, it should lapse and form part of the residuary estate, which by the provisions of Article "FIFTH" of the Will was left in trust for the benefit of private individuals.

(8) The Circuit Court of Appeals erred in holding and deciding in effect that the right to a deduction from the value of the testator's gross estate of the amount of the legacy provided for in Article "THIRD" of the testator's Will was defeated by a possibility, arising from the pro-

vision of Article "THIRD" more fully described in Assignment "(7)", that such legacy might have lapsed and thereupon might have passed to private uses, notwithstanding the remoteness of such possibility under the circumstances involved, and notwithstanding that such possibility was precluded by the designation and payment actually made.

(9) The Circuit Court of Appeals erred in affirming, and in failing to reverse, the decision of the United States Board of Tax Appeals determining a deficiency in the amount of the Federal Estate Tax on the testator's estate resulting from the disallowance of the deduction claimed by the Executors in respect of the legacy to The Lalor Foundation, Inc.

Reasons Why Writ Should Be Granted

(1) The decision of the Circuit Court of Appeals, in its application and construction of the second paragraph of Treasury Regulations 80, Article 47, is in substantial conflict with another Circuit or Circuits.

(2) The decision of the Circuit Court of Appeals is in substantial conflict with decisions of this Court holding that tax deduction provisions as to charitable legacies should be construed not narrowly but liberally.

(3) The decision of the Circuit Court of Appeals is also in conflict with the policy of this Court on the question of the certainty or uncertainty of charitable legacies, and the important question presented in this case should be passed upon by this Court, and in the favorable light of such policy.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari may issue out of and under the seal

of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the Court to certify and send to this Court on a day designated for its review and determination a full and complete transcript of the record and full proceedings in said Circuit Court of Appeals had in the case Numbered 57, and entitled, "Charles Lalor Burdick and Chemical Bank & Trust Company, Trustees of the Last Will and Testament of Willard A. Lalor, deceased, Petitioners, against Commissioner of Internal Revenue, Respondent"; to the end that said cause may be reviewed and determined by this Court as provided by law, that the determination of the United States Circuit Court of Appeals for the Second Circuit herein may be reversed, and that your petitioners may have such other and further relief as may be just.

Dated: New York, N. Y., May 26, 1941.

CHARLES LALOR BURDICK and CHEMICAL BANK & TRUST COMPANY, Trustees of the Last Will and Testament of Willard A. Lalor, Deceased,

Petitioners.

TOWNSEND & LEWIS,
Attorneys for Petitioners,
Office and P. O. Address,
120 Broadway,
New York, New York.

DALLAS S. TOWNSEND,
GARDNER D. HOWIE,
RALPH M. JERSKEY,
Of Counsel.

State of New York, }
County of New York, } ss.:

DALLAS S. TOWNSEND, being duly sworn according to law, deposes and says that he is one of the attorneys for the petitioners, that he prepared the foregoing petition, and that the facts therein stated are true to the best of his information and belief.

DALLAS S. TOWNSEND.

Subscribed and sworn to before me }
this 26th day of May, 1941. }

MERRILLE T. MOREHOUSE
Notary Public Bronx Co. No. 158, Reg. No. 151-M-42
Cert. filed in N. Y. Co. No. 888, Reg. No. 2-M-547
Commission expires March 30, 1942